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SUPREME COURT, U.S.

No. 02-1205

In the
Supreme Court of the United States

EDITH JONES, et al.,
Petitioners,

v.

R.R. DONNELLEY & SONS CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF ALABAMA, HAWAII, LOUISIANA, MASSACHUSETTS, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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October 2, 2003

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QUESTION PRESENTED

In a civil action alleging race discrimination in the "mak[ing] and enforc[ing]" of contracts under 42 U.S.C. § 1981, should a court borrow the forum state's statute of limitations for personal injuries, following *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), or apply the borrowing rule to contract formation claims and the catch-all four-year limitation period of 28 U.S.C. § 1658 to all other claims under § 1981?

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STATEMENT OF INTEREST

The States of Alabama, Hawaii, Louisiana, Massachusetts, Texas, and Utah respectfully submit this brief as amici curiae in support of respondent R.R. Donnelley & Sons Co., urging this Court to affirm the judgment of the United States Court of Appeals for the Seventh Circuit. As frequent litigants in their own courts and in the federal courts, the amici States have a strong interest in ensuring that statutes of limitations are sensibly construed and easy to administer. Statutes of limitations "are not simply technicalities" but are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980).

The rule that petitioners and their amici propose would create confusion and unnecessary litigation for the States. The onerous task that their rule requires, of determining whether a legal liability is newly created, would be an unwelcome burden for the States, whose budgets are already strained by the ever-growing tide of litigation against them. States would be compelled to scour outdated versions of the United States Code in an effort to determine whether an Act of Congress created a fresh claim or simply clarified an old one. Because of the uncertainty and expense that the proposed construction would cause the States, amici have an interest in opposing it.

Moreover, the "federal ingredient" or "essential element" test (which petitioners suggest but implicitly abandon) would unsettle the legitimate expectations of those States that have understandably assumed that state law claims would be governed by state limitations periods. Under this definition, state claims that include a federal ingredient and that lack an express limitations period would be governed by section 1658. Because of the

displacement of state common law limitations periods, section 1658 implicates a state's sovereignty. As this Court recognized well over a century ago, "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *M'Elmoyle v. Cohn*, 38 U.S. (13 Pet.) 312, 327 (1839).

Finally, the "federal ingredient" or "essential element" definition that petitioners and their amici advance would retroactively lengthen the limitation periods of certain claims against the States. In that respect, the States' interest is similar, if not identical, to their interest in *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002), in which this Court held that the tolling provision of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d), should not be read to apply to claims against non-consenting States that were filed in federal court but later dismissed on Eleventh Amendment grounds. For all these reasons, amici have a significant interest in arguing against an overbroad, unsound interpretation of section 1658.

STATEMENT OF THE CASE

Amici adopt the statement of the case in respondent's brief.

SUMMARY OF THE ARGUMENT

The language of 28 U.S.C. § 1658 is plain enough. It applies only to "civil action[s] arising under an Act of Congress enacted after [December 1, 1990]." "Arising under" is the operative phrase, and the natural understanding of that phrase in this context would suggest that section 1658 applies to civil actions whose statutory source is a post-December 1, 1990 statute. An

action like the one in this case — asserted under the prohibition on discrimination in the making of contracts in 42 U.S.C. § 1981(a), which long pre-dates December 1, 1990 — cannot be said to "arise under" an amendment to that statute.

Furthermore, the alternative interpretations proposed by petitioners and their amici — which have traction only if section 1658 is first determined to be ambiguous — lead to nonsensical results. Petitioners give no good reason for this Court to construe section 1658 in a manner other than its ordinary meaning. "Arising under" means "originating in," not "deriving one of many essential elements from", a given statute. For this reason, the judgment of the court of appeals was sound and should be affirmed.

ARGUMENT

I. The Decision Below Is Faithful to the Plain Meaning of the Statute.

Statutory construction begins, of course, with the text of the statute. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 439 (2002). "Where, as here, the statutory language is unambiguous, the inquiry ceases." *Id.* The ordinary meaning of the term "arising under" in section 1658 — originating in, springing up from — supports the decision below. Petitioners' attempt to turn "arising under" into a term of art with an extraordinary meaning should be rejected.

A. A Claim to Enforce a Right "Arises Under," Or Springs Up From, the Statutory Provision That Codifies the Right, Not a Collateral Definitional Section.

Under the ordinary meaning of the words in the statute, section 1658 does not apply to petitioners' claims.

Section 1658 applies only to "civil action[s] arising under an Act of Congress enacted after [December 1, 1990]." A "civil action," as the United States notes, is "a legal demand instituted in a court to enforce a right." U.S. Br. 10. And "arising under," in common parlance, means to "spring up" or to "originate." U.S. Br. 10-11 (quoting American Heritage Dictionary 99 (3d ed. 1991); Oxford English Dictionary 445 (1933)); *see also* Black's Law Dictionary 102 (7th ed. 1999) ("stemming from").

Under these definitions, petitioners' claims arise under section 1981(a), not section 1981(b). A legal demand to enforce a right is best understood as "arising under"— "springing up from" or "originating in" — the statutory provision that codifies that right. It does not "spring up from" a collateral provision that defines a particular term in the statutory provision codifying the right. No one would say that they are bringing suit under a definitional provision. A RICO action, for example, is brought under the substantive provisions in 18 U.S.C. § 1962, not under the definition of "racketeering activity" in 18 U.S.C. § 1961(1). *See Scheidler v. National Organization of Women, Inc.*, 123 S. Ct. 1057, 1063 (2003). A Family and Medical Leave Act suit is brought under the private right of action in 29 U.S.C. § 2617(a)(2), not under the definition of "employee" in 29 U.S.C. § 2611(3). *See Nevada Dept. of Human Resources v. Hibbs*, 123 S. Ct. 1972, 1976 (2003).

True to this plain meaning, courts generally refer to claims like petitioners' as having been brought under section 1981(a), which codifies the "right ... to make and enforce contracts" free from discrimination. *See, e.g., Taylor v. Runyon*, 175 F.3d 861, 865 (11th Cir. 1999); *Danyluk-Coyle v. St. Mary's Medical Center*, 2001 WL 771048, *1 (E.D. Pa. 2001); *Bevil v. Smit Americas, Inc.*, 883 F. Supp. 168, 169 (S.D. Tex. 1995). Although the

claims could not have succeeded without section 1981(b), they arose under section 1981(a).

It is irrelevant that petitioners could not have prevailed on their conditions-of-employment claims before 1991. Under the text of the statute, the issue is not whether the type of claim was viable before December 1, 1990, but rather whether the "Act of Congress" under which the claim has arisen was enacted before that date. 28 U.S.C. § 1658. Because their claims arise under section 1981(a), and because that provision was enacted well before December 1, 1990, petitioners' claims are not subject to the four-year limitation period in section 1658. They are subject to the forum state's statute of limitations for personal injury claims, under *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987).

B. The "Essential Element" or "Federal Ingredient" Interpretation of Section 1658 Is Irrelevant and Does Not Override the Ordinary Understanding of the Phrase "Arising Under."

Well aware that the ordinary understanding of the statute sinks their claims, petitioners argue that the words "arising under" constitute a legal "term of art" with a settled meaning that must be applied here. Petr. Br. 13. They contend that a claim arises under a federal law whenever that law is an "essential element" of the claim. Petitioners' amici make this argument as well, stating that a case arises under a federal law whenever the law "'forms an ingredient of the original cause'" or is a "'necessary element'" of the cause. U.S. Br. 10 (quoting *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 823 (1824); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988)).

The primary flaw in this argument is that the "essential element" interpretation of the term "arising under" has been employed in but a single context: subject matter jurisdiction. It has not been exported elsewhere. In addressing the Medicare and Social Security Acts, for example, this Court has defined "arising under" to mean "inextricably intertwined," not an "essential element" or "federal ingredient." *Heckler v. Ringer*, 466 U.S. 602 (1984); *Weinberger v. Salfi*, 42 U.S. 749 (1975). What it means to be an "essential element" of a claim is not even settled within the context of subject matter jurisdiction. *See, e.g., Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986) (holding that a claim does not arise under federal law for purposes of 28 U.S.C. § 1331 when Congress intended "no federal private right of action," even though the federal law is an essential element of the claim); *Caterpillar v. Williams*, 482 U.S. 386, 391 (1987) (claim "aris[es] under" § 301 of the LMRA only if it is "substantially dependent upon the analysis of a collective bargaining agreement") (quotations omitted); *Metropolitan Life Ins. Co. v. Taylor*, 465 U.S. 58, 65 (1987) (claim "aris[es] under" § 502(a) of ERISA only if it is a claim to enforce benefit rights from a covered plan).

Furthermore, there is no logical reason to apply the "essential element" or "federal ingredient" definition to section 1658, the purpose of which bears no resemblance to the one underlying 28 U.S.C. § 1331. In section 1331, Congress granted the federal courts jurisdiction to interpret federal law and thus to preserve the consistency of federal law. A broad definition of "arising under" helps serve that purpose. Section 1658, by contrast, was not designed for maximum breadth. Congress rejected a proposed statute that would have covered all federal laws lacking a limitation period. Report of the Federal Courts Study Committee (1990). Instead of enacting a broad rule, Congress intended to provide a sensible rule that

would not operate "retrospective[ly]." H.R. Rep. No. 101-734, at 24 (1990).

Section 1658 was meant to provide a single limitations period for a given legal claim. Whereas a claim can "arise under" multiple federal laws for purposes of subject matter jurisdiction, a claim can sensibly arise under only one statute for the purpose of determining the limitation period. Because section 1331 and section 1658 serve different objectives, there is no reason to transpose the definition of "arising under" from one to the other.

II. Even If the Term "Arising Under" in Section 1658 Were Ambiguous, the Court Should Reject The Definition Advanced By Petitioners And Affirm The Decision Below.

At worst, the term "arising under" in section 1658 is ambiguous. The ambiguity might permit use of the "essential element" interpretation from section 1331, if that interpretation were sensible. But it is not. First, the "essential element" interpretation could displace state limitation periods. Second, it would cause section 1658 to apply retroactively. Third, it would result in a single subsection having multiple limitation periods. And fourth, it would cast serious constitutional doubt on the application of section 1658 to cases in which a State is a defendant.

A. The "Essential Element" Definition Could Displace State Limitation Periods.

As the United States concedes, "where the vindication of a right under state law necessarily turn[s] on some construction of federal law," that state claim "arises under" federal law in the "essential element" sense of the term. U.S. Br. 12 (quoting *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (internal quotation marks omitted)). For example, if a state prohibition on

employment discrimination invoked a federal definition of "employer," federal law would be an "essential element" of claims brought under that state statute. Those claims would be covered by section 1658 under the "essential element" definition, unless the state legislature had enacted an express limitations period for them. If the limitation period had previously been supplied by state common law, section 1658 would override it.

Congress did not intend this result, which would impinge upon state sovereignty. As this Court explained more than 160 years ago, "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *M'Elmoyle v. Cohn*, 38 U.S. (13 Pet.) 312, 327 (1839). Moreover, displacing state limitations periods would unsettle the expectations of litigants, who understandably assume that state claims are subject to state limitation periods, as they have been in the past. Litigants might now find that previously viable claims have become time-barred, or that previously barred claims have become viable again. To remedy the situation and restore the status quo, state legislatures would be forced to enact statutes of limitations for each of these claims. Until the legislatures discharged this burden, section 1658 would have the effects that, assuredly, no member of Congress ever expected.

B. The "Essential Element" Definition Would Cause Section 1658 to Have Impermissible Retroactive Effect.

Under the "essential element" definition, whenever any element of a claim is based on a federal law amended after December 1, 1990, the claim would be covered by section 1658. *Zubi v. AT&T Corp.*, 219 F.3d 220 (3d Cir. 2000) (under the "essential element" definition, "the four-year limitations period would apply[] to any civil lawsuit containing a claim based on a statute that has been amended in any way after December 1, 1990"). It would not matter whether the claim was viable under pre-existing law. The claim would now depend on the amended statute, not the former statute, which is no longer even on the books. The amended statute is the "essential element."

Thus, claims that previously borrowed a limitations period from state law would now be subject to section 1658's four-year period. As noted above, some viable claims might instantly become time-barred, and barred claims might get a second life. This result would fly in the face of Congress's decision to avoid retroactive application:

> [W]ith respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision ... [and] retroactively imposing a four year statute of limitations ... would threaten to disrupt the settled expectations of a great many parties. Given that settling expectations ... is an essential purpose of statutes of limitations, the Committee was reluctant to apply this section retroactively.

H.R. Rep. No. 101-734, at 24 (1990). It would also flout the Third Circuit's observation that "[s]ection 1658 seeks to distinguish between cases arising under certain Acts of Congress from cases arising under other Acts of Congress for the purpose of preserving existing statute of limitations case law." *Zubi*, 219 F.3d at 228.

C. The Essential Element Definition Would Result In A Single Subsection Having Multiple Limitations Periods.

Third, petitioners' definition would produce the anomalous result that the same words in the same subsection of the same statute could be subject to two more limitations periods. Petitioners and their amici acknowledge that claims of racial discrimination in the "mak[ing] and enforc[ing]" of contracts that were viable before the Civil Rights Act of 1991 would not be subject to section 1658 and would continue to be governed by *Goodman*. Yet petitioners insist that claims of racial discrimination in the "mak[ing] and enforc[ing]" of contracts that became viable in 1991 would be subject to section 1658. The claims derive from the same three words of the same sentence of the same statutory text, but two different statutes of limitations would apply.

The United States attempts to skip past this absurdity — and the disruption it would cause to litigants' reasonable expectations about sensible limitations periods — by labeling it a mere "policy concern." U.S. Br. 27. But any construction producing an absurd result is heavily disfavored, unless compelled by unambiguous statutory text. *United States v. X-Citement Video*, Inc., 513 U.S. 64, 70-71 (1994). Here, petitioners can find no comfort in the text of the statute, which at worst is ambiguous and at best compels the wholesale rejection of petitioners' proposed definition.

D. The Essential Element Definition Would Cast Serious Constitutional Doubt on the Application of Section 1658 to Cases Involving States as Defendants.

Fourth, if the Court adopted the "essential element" definition, there would be a serious question whether

section 1658 could be applied to cases involving States as defendants. This Court has not yet addressed whether the lengthening of a limitations period against an unconsenting State constitutes an abrogation of state sovereign immunity; however, the Court has made clear that the issue "raises a serious constitutional doubt." *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002). In *Raygor*, the State had consented to suit in state court, but only under a particular statute of limitations. This Court thus held that a federal tolling statute, 28 U.S.C. § 1367(d), might be unconstitutional as applied to the State. By expanding the terms of the State's waiver of sovereign immunity, the statute at least arguably encroached upon that immunity.

To avoid this constitutional issue, and to preserve the "historic powers" of the States, the Court imposed a clear statement rule. *Raygor*, 534 U.S. at 543. As the Court provided, "[w]hen Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted)). This rule "reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers which Congress does not readily interfere.'" *Raygor*, 534 U.S. at 544 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461, 464 (1991)).

By the same logic, section 1658 could not apply to many cases involving States as defendants, if the "essential element" definition were adopted. Under that definition, pre-existing claims that now arise under amended statutes would be subject to the four-year limitation period, instead of the period borrowed from state law. If the state-law period were less than four

years, section 1658 would effectively lengthen the limitation period. Under *Raygor*, Congress cannot lengthen the limitation period for a suit against a State unless Congress makes a clear statement that it intends to do so. Because section 1658 contains no such statement, it could not be applied to cases involving States as defendants.

As a result, were this Court to adopt the "essential element" definition, it would likely have to make an exception for cases in which the States are defendants. With respect to section 1981, for example, States that were previously subject to two- or three-year limitations periods would continue to be subject to those periods for all claims, even though other defendants would be subject to a four-year period for claims made viable by the 1991 Civil Rights Act.

There is no reason to adopt such a rule. The text of the statute does not support it. The legislative history undermines it as well. Thus, if the Court concludes that section 1658 is ambiguous, it should construe it in a simple, sensible manner, without creating the need for exceptions and various limitations periods for different classes of defendants.

III. Petitioners' and Their Amici's Attempt to Refine the "Essential Element" Definition Only Causes Further Confusion.

Petitioners and their amici have another creative alternative to plain meaning and sensible results. The United States proposes that a claim "arises under" a statute enacted after December 1, 1990, if that statute (1) is an essential element of the claim and (2) "create[d] liabilities that had no legal existence before the Act was passed." U.S. Br. 19. Because this alternative is without textual support and would prove utterly unworkable —

especially for States, which are frequent defendants — the Court should reject it.

A. The Alternative Definition Has No Basis in the Text of the Statute.

First, the alternative definition has no roots in the text of the statute. Neither petitioners nor their amici can point to a single occasion in which "arising under" has been defined in this manner. Even in the context of subject matter jurisdiction under section 1331, courts have never required that a statute "create liabilities that had no legal existence before the Act was passed."

The proposal of this novel definition undercuts the argument by petitioners and their amici that "arising under" is a "term of art" with a settled meaning. Petr. Br. 13; *see also* U.S. Br. 6-7. Adding an additional element to the definition confirms that "arising under" does not mean "essential element." If it had that singular meaning, petitioner and their amici would be in no position to propose alternatives.

B. The Alternative Definition Is Unworkable.

Second, this alternative definition would be unworkable, especially for the States, who must defend against countless federal claims. Although petitioners and their amici do not articulate when a statute "create[s] liabilities that had no legal existence before the Act was passed," it appears that a statute would not create new liabilities if those liabilities already existed under a different statute. As a result, if Congress repealed section 1981 and replaced it with a broad prohibition on discrimination, courts would have to determine not only whether a claim fell within the new, broader prohibition, but also whether it fell within old section 1981. If the claim were valid under section 1981 (or some other provision pre-dating section 1658, such as Title VII of the

Civil Rights Act of 1964), the *Goodman* borrowing rule would apply. If the claim were not valid under section 1981 or some other pre-December 1, 1990 law, then section 1658 would apply. Indeed, under this definition, Congress could enact an independent, stand-alone cause of action; if that cause of action happened to mirror a claim based in an existing statute, section 1658 would not apply.

The consequences of this rule would be two-fold. First, in this particular case, petitioners would lose, because the legal liabilities that they allege pre-existed the Civil Rights Act of 1991. The liabilities existed under Title VII. Second, and more generally, litigants and courts in all future cases would have to scour prior versions of the United States Code to determine whether a claim is new or was previously viable. Assuming that the now-outdated (and probably discarded) Code volumes were accessible, this onerous task would be an inefficient use of judicial resources and an unwelcome burden to all litigants — especially the States, whose budgets are already overtaxed by the ever-growing tide of litigation.

Petitioners might suggest other ways to construe or limit the phrase, "create liabilities that had no legal existence before the Act was passed." They might propose to limit the search to the statutory regime being changed. If that particular regime — say, section 1981 — did not protect the right being asserted prior to December 1, 1990, then the right would new, even if another regime — say, Title VII — provided for it. No one — not even the United States — has endorsed such a restriction. Every such attempt to gerrymander the "essential element" definition with addenda and provisos moves the definition even farther from the text of the statute and confirms that "arising under" is not a term of art.

Finally, any attempt to distinguish newly created liabilities from old ones runs into the same formidable obstacle — that it will not always be clear whether a liability previously existed. As the Third Circuit explained, "the line between an amendment that modifies an existing right and one that creates a new right is often difficult to draw." *Zubi*, 217 F.3d at 224. "Amendments frequently are intended to clarify the law when there has been a difference of opinion regarding the interpretation of an existing statute." *Id.* "In such situations, conflicting views on whether the clarifying amendment created new rights or merely codified the preexisting case law are what occasion the amendment." *Id.*

Section 1981 is illustrative. Had Congress amended the statute before *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), it would have been amending the law in light of a circuit split. As a result, different circuits might reach different conclusions about whether the amendment created a new liability or confirmed an old one. Those circuits that had already construed section 1981 to include conditions-of-employment claims would hold that the amendment was just a clarification and did not create any new liabilities. By contrast, the Fourth Circuit, which interpreted "make and enforce" to exclude those claims, would find that the amendment created a new liability.

Under this hypothesized limitation, any time Congress amended a statute to eliminate a circuit split, different circuits would end up with different limitation rules. Even more problematic, any time Congress clarified any law — whether or not it was resolving a circuit split — all litigants and courts will be forced to grapple with the question whether the clarification created a new liability. Parties and judges alike will have to decide two questions in every case. First, as always,

what is the law? Second, what was the law? Because "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitation," *Wilson v. Garcia*, 471 U.S. 261, 266 (1985), this Court should reject so Byzantine an interpretation of section 1658.

These problems affect all litigants but are particularly acute with respect to the States. States and state officials frequently find themselves as defendants in lawsuits against a litany of federal claims, from section 1981 to section 1983, and from Title VII to the Family and Medical Leave Act. If this Court adopts petitioners' definition, every time Congress amends any statute that could be applied to the States, they will have to decide whether or not the amendment created a new liability or clarified an old one. It is doubtful that Congress intended to impose this burden when it enacted section 1658.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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October 2, 2003